Supplemental Basis Statement and Response to Comments
Chapter 2 Rule Concerning the Processing of Applications and Other Administrative Matters

List of Commenters

1. Avery Day, Esq. (orally at hearing)
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2. Juliet Browne, Esq. (written comment dated 1/22/2013)
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3. Jennifer Burns Gray, Esq. (written comment dated 01/22/2013)
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4. Nancy McBrady, Esq. (written comment dated 1/22/2013)
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SUMMARY OF COMMENTS BY SECTION

Section 1. Definitions

Comment #1. Section 1(I). Hearing. Commenter #3 states that the rule should define and more clearly distinguish among "public hearings," "adjudicatory hearings," and "public meetings" and clarify when a word for word transcription of a proceeding will be made.

Response: The Department recognizes that it would be helpful to clarify the difference between a hearing on a license application and a public meeting to accept public comment on an application. In response to the comment, Sections 7 and 8 of the rule have been amended as follows:

Section 7(A) Request for a Hearing on a License Application. After the first sentence, insert the following sentence: "A hearing is an opportunity for an applicant, an appellant, any intervenors, and members of the public to provide testimony under oath and for witnesses to be cross-examined on the substance of their testimony."

Section 8. Public Meetings on License Applications. After the third sentence, insert the following sentence: "Persons commenting on the application are not under oath and there is no opportunity for cross-examination."

Additionally, the Office of the Attorney General commented that not all licensing hearings meet the Maine Administrative Procedure Act's definition of an adjudicatory hearing. Accordingly, the term "adjudicatory" has been removed from the definition of hearing.

Comment #2. Section 1(K). Intervenor. Commenter #2 states that the Maine Administrative Procedure Act provides that an agency may afford intervenor status in the absence of a public hearing. The commenter proposes the following changes to the definition of Intervenor:

> "Intervenor" means a person who, in the accordance with the Maine Administrative Procedures Act, 5 M.R.S. § 9054(1) and (2), ~~and the Department's rules governing hearings,~~ has been granted leave to participate in a license application or appeal proceeding ~~where a decision has been made to hold a hearing~~."

Response: The Department does not utilize the intervenor process unless a hearing is being held. Persons interested in tracking an application, submitting comments on an application, and commenting on a draft license decision may request interested person status. No change was made to the rule.

Comment #3. Section 1(L). License. In response to a comment from the Office of the Attorney General, the definition of license has been changed to more closely track the definition in the Maine Administrative Procedure Act, 5 M.R.S. §8002(5). The definition is revised to read: "...certification, approval, or similar form of permission..."

Comment #4. Section 1(R). Transfer of Ownership. Commenter #4 recommends amending the definition to indicate that the sale of membership interests in a limited liability corporation (LLC) is not a transfer of ownership. Commenter #4 proposes the following language change:

"A sale or exchange of stock (or in the case of a limited liability corporation, of membership interests), or a merger is not a transfer of ownership…"

Response: The Department agrees with the comment. The change has been made.

Comment #5. Commenter #4 suggests adding a definition of "public information meeting."

Response: Public informational meeting is described in detail in Section 13 of the rule. The Department does not believe that a separate definition is necessary. No change was made to the rule.

Section 2. Scope of Rule

Comment #6. Commenter #4 notes that the rule does not address the appeal of a Commissioner's order under laws such as the Uncontrolled Hazardous Substance Sites Law. This issue should be addressed by the Department including possible additional rulemaking.

Response: The Commenter is correct that the rule does not address an appeal of a Commissioner's enforcement order. Hearings held in connection with appeals of an enforcement order of the Commissioner are conducted in accordance with procedural rules tailored to the particular circumstances of the proceeding, which vary considerably from case to case. No change was made to the rule.

Section 3. Filing of Submissions and Computation of Time

Comment #7. Section 3(A). On the Department. Commenter #4 recommends the following changes to the language regarding filing of documents with the Department:

"(3) telefax, only if followed by receipt of an identical original hardcopy document within five (5) working days; or

(4) electronic mail, with attachments supplied in an unalterable format, showing a handwritten or electronic signature acceptable to the Department, only if followed by receipt by hand delivery, delivery service (e.g. Federal Express or U.S. Mail), of an identical hardcopy original document…

…Submissions not received by the Department by a prescribed deadline will be deemed untimely and will not be considered by the Department in the absence of good cause shown."

Response: The Department agrees that the rule should specify the nature of the original document to be filed and has inserted the word "paper." However, the suggestion

regarding the manner in which the paper copy will be delivered to the Department is not necessary and this change was not made to the rule. The Department has added the phrase in the last paragraph providing for the exercise of discretion in accepting a filing after the deadline.

Comment #8. Section 3(B). On Others. Commenter #4 recommends adding the following language to the last paragraph:

> "Submissions not received by the recipient by a prescribed deadline will be deemed untimely and will not be considered by the Department in the absence of good cause shown."

Response: The comment highlighted an internal inconsistency in this section of the rule. While Section 3(B) states that a filing is complete on persons other than the Department when the submission is sent to the intended recipient or that person's representative, the final sentence ties the submission to the date of receipt. The Department cannot control whether each intended recipient of a filing actually receives its copy of the filing by a certain date and time, and the Department cannot disregard submissions that are timely filed with the Department. Therefore, the sentence: "Submissions not received by the recipient by a prescribed deadline will be deemed untimely" has been deleted and the change requested by the commenter was not made.

Section 4. Advisory Rulings

Comment #9. Commenter #4 argues that a request for an advisory ruling should be directed to the bureau, not the division, because multiple divisions may be involved depending upon the subject of the request.

Response: Division Directors have the most detailed knowledge of the licensing requirements, regularly consult with relevant programs in other divisions, and can most efficiently process a request for an advisory ruling. No change was made to the rule.

Section 5. Inspection

Comment #10. Commenter #4 recommends revising the language to read:

> "Authorized representatives of the Department may ~~enter any property~~ at reasonable hours ~~and~~ enter any property or building with the consent of the property owner, occupant or agent, or in the absence of consent, pursuant to the terms of any license, permit, approval or decision issued by the Commissioner or by the Board regulating the property or facility or the terms of an administrative search warrant…"

Response: The language in the rule tracks the Department's authority as set forth in 38 M.R.S. § 347-C Right of inspection and entry. The proposed language would limit the Department's authority to inspect a property which is the subject of an application. No change was made to the rule.

Section 7. Hearings

Comment #11: Section 7(B). Criteria for Holding Hearings. Commenter #3 argues that the criteria for holding public meetings and hearings should include whether there is significant public interest and whether the information to be presented will assist the Commissioner or Board in reaching a decision. Commenter #3 argues that the current language regarding a determination on when a hearing will be held, namely situations where there is "credible conflicting technical information" is too narrow and overlooks important criteria such as adverse impacts to existing uses and scenic character which may not be considered "technical information." Commenter #3 recommends the following change to the language in Section 7(B):

> "The Department will hold hearings in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion or where there is significant public interest, and, in either case, it is likely that a hearing will assist the Department in understanding the evidence."

Response: The Commenter's suggestion to include applications of significant public interest in the universe of applications where a public hearing will be held could significantly expand the number of applications requiring a hearing leading to delays in the processing of applications and increased costs. The Department always has the discretion to hold a public hearing on an application that is of significant public interest if it believes a hearing is warranted. No change was made to the rule.

Section 8. Public Meetings on License Applications

Comment #12. Commenter #3 states that the Board and Commissioner should have the discretion to hold public hearings in the most appropriate locations including any area near citizens who want to testify. Commenter #3 suggests the following change to the proposed rule:

> "At the Board's or Commissioner's discretion, the Board or Commission may schedule and hold public meetings or public or adjudicatory hearings in accordance with Title 38 §345-A(5) on license applications in the geographic area of a proposed project or activity or in any area near citizens who may want to testify for the purpose of..."

Response: This section of the rule addresses public meetings, not hearings. The timing, location and purpose of a public meeting are addressed in statute at 38 M.R.S. §345-A(5), and the geographic area of a proposed project or activity is identified as an appropriate location for a public meeting. The rule does not limit the number of public meetings that may be held and, in some instances, the Department may schedule more than one meeting to accommodate persons in other areas of the State who are interested in a project and want to comment on the project. No change was made to the rule.

Comment #13. Commenter #4 recommends adding intervenors to the list of persons to be notified of a public meeting. Commenter #4 proposes the following language:

> "The Department shall notify the applicant, ~~and~~ interested persons, intervenors (should the Department have already recognized intervenors) and … "

Response: As stated in the response to Comment #2, the Department does not utilize the intervenor process unless a hearing is scheduled. No change was made to the rule.

Section 10. Pre-Application and Pre-Submission Meetings Required

Comment #14. Commenter #4 notes that Section 10(B)(6) of the proposed rule lowers the threshold for requiring applicants to attend a pre-application meeting with the Department from an application involving more than two bureaus to an application involving more than one bureau. Such a change has the effect of requiring public informational meetings for more applications under provisions of Section 13 of the rule. Commenter #4 recommends that the requirement to hold a public informational meeting be limited to applications involving more than two bureaus. Commenter #1 shares this concern.

Response: The initial purpose of the proposed change in the requirement for a pre-application meeting was to facilitate coordination of application processing and was not intended to expand the universe of applications requiring public informational meetings. The Department agrees with the comment and has modified the rule to re-instate the requirement that pre-application meetings, and public informational meetings, be held for applications requiring a permit from more than two bureaus. This change is also made in Section 11(C) of the rule.

Comment #15. Section 10(B)(6) states that a pre-application meeting is required for projects requiring new or amended licenses involving more than one bureau. Commenter #1 states that the term "involving" more than one bureau is ambiguous and should be clarified. Commenter #1 also asks if this provision would affect a global permit transfer application that involves permits from more than one bureau and questions whether the rule would require a public informational meeting for a global transfer.

Response: The Department agrees that the term "involving" should be clarified. The rule has been changed to read "new or amended licenses from..." The Department has

also amended the rule to clarify that minor revisions are not included in the requirement. With respect to global transfer applications, a global transfer is not a new or amended license and, therefore, a pre-application meeting is not required.

Section 11. Application Requirements

Comment #16. Section 11(B). Acceptance of Application. Commenter #4 states that the rule should require the Department to provide the applicant with actual notice that an application has been accepted as complete for processing. Commenter #4 proposes the following language:

> "The Commissioner shall, within 15 working days of receipt of an application by the Department, ~~send written~~ provide actual notice to the applicant that contains the date the application was accepted as complete for processing, or return the application and specify in writing the reasons it was returned…If the Commissioner does not ~~mail~~ provide actual notice to the applicant of acceptance or rejection of the application within 15 working days…"

Response: The Department disagrees with the comment that the Department should "provide actual notice." Such language would require the Department to verify that notice was received by the proper party, including that electronic notice is actually received and read by the intended recipient. Tracking correspondence in this matter would be enormously burdensome. Where such verification is necessary, as in the case of the denial of an application, the Department provides a copy of the decision by certified mail, return receipt requested. It is incumbent upon applicants and interested persons to provide the Department with reliable contact information. The requested change was not made to the rule. However, for consistency with other provisions of the rule and to allow for notice by electronic mail, "mail notice" in the last sentence of the first paragraph has been changed to "provide" notice.

Comment #17. Section 11(C). Projects Requiring Multiple Licenses. For applications that require more than one license, Commenter #4 recommends specifying the timeframe for the Department to request that all other required applications be submitted before any such application is accepted as complete for processing. The commenter recommends the following language:

> "…the Department may require, in writing within 15 working days of the filing of the initial application that, the applicant to submit all other required applications before any such application will be accepted as complete for processing…"

Response: The deadline for the Department to determine whether an application will be accepted as complete for processing is found in Section 11(B) of the rule. The pre-application meeting is an opportunity for the applicant and the Department to identify and discuss all of the permits that will be required for a given project and thereby facilitate preparation and submission of the required application(s). To the extent that

the need for an additional permit for a project is identified during the processing of an application, the Department will notify the applicant as soon as the need is identified. No change was made to the rule.

Comment #18. Section 11(D). Title, Right or Interest. With respect to a submerged lands lease, Commenter #4 recommends deleting the language "and likely to be approved." The commenter argues that the timing for filing an application with the Department and for filing the associated application for a submerged lands lease with the Department of Agriculture, Conservation and Forestry make it difficult to demonstrate at the time of filing with the Department that a submerged lands lease is likely to be approved.

Response: The Department recognizes that an application for a submerged lands lease (which is filed with the Department of Agriculture, Conservation and Forestry) is processed simultaneously with the project application filed with the Department. The granting of a submerged lands lease and a Department license for a given project are dependent upon, and conditioned upon, one another. The Department agrees with the comment that an applicant, at the time of filing an application with the Department, cannot provide an affirmative statement that a submerged lands lease is likely to be approved. The requested change has been made to the rule.

Comment #19. Section 11(D)(4). With respect to eminent domain, Commenter #4 requests the following language change:

> "When the applicant has eminent domain power over the property, evidence must be supplied as to the ability and intent to use the eminent domain power to acquire sufficient title, right or interest ~~as determined by the Department~~ to the site proposed for development or use; "

Response: The introductory paragraph in Section 11(D) provides for the exercise of Department discretion; therefore, the phrase "as determined by the Department" is duplicative and may be deleted here. The addition of the language "to the site proposed for development or use" serves to clarify the rule. The recommended changes have been made to the rule.

Section 12. Application Fees and Processing Times

Comment #20. Commenter #4 requests the addition of the following language:

> "Application fees shall be identified by the Department staff at the pre-application meeting and confirmed at the pre-submission meeting, if such meetings are required."
> Commenter #4 also requests the addition of the following language at the end of the section: "...application fees paid at the time of filing the application shall be credited towards payment of any special fees."

Response: With respect to the first requested change, application fees are published by the Department and the applicant may clarify the fee with staff at any time. The requested changed has not been made. With respect to the second requested change, the Department agrees that if the applicant pays an application fee at the time of filing of an application and special fees are subsequently imposed, the initial application fee should be returned or credited toward the payment of the special fee. The following sentence is added to the rule: When this designation is made, any application fees paid at the time of filing the application shall be returned or credited toward payment of any special fees.

Section 15. Board Notice of Applications

Comment #21. Commenter #4 recommends adding the following clarifying language:

> "The report must include the name and Department number assigned to the application, the date of acceptance as complete for processing, a brief description…"

Response: The proposed change serves to clarify the rule; the change has been made.

Section 17. Board Assumption of Jurisdiction over an Application

Comment #22. Section 17(B). Commenter #4 recommends adding the following clarifying language to the last paragraph:

> "If a request for Board jurisdiction has been made and the Commissioner determines that the criteria for Board jurisdiction as identified in Section 17(C) of this rule are not met…"

Response: The requested change serves to clarify the rule and, with the addition of a reference to the applicable statute, has been made. See the response to Comment #23 regarding additional changes to this subsection.

Comment #23. Section 17(D). Commenter #4 recommends deleting the existing language in this section as redundant with Section 17(C). Commenter #4 recommends adding the following language to this section to incorporate language from 38 M.R.S. § 341-D regarding agency review comments and opportunity to respond:

> "Prior to holding a hearing on an application over which the Board has assumed jurisdiction, the board shall ensure that the department and any outside agency review staff assisting the department in its review of the application have submitted to the applicant and the board their review comments on the application and any additional information requests pertaining to the application and the that the applicant has had an opportunity to respond to those comments and requests.

If additional information needs arise during the hearing, the board shall afford the applicant a reasonable opportunity to respond to those information requests prior to the close of the hearing record."

Response: The proposed change regarding agency review comments pertains to procedures governing a hearing on a license application and are included in the Department's Chapter 3 Rules Governing the Conduct of Licensing Hearings. The change was not made to the rule.

The comment highlighted the need for greater clarity in this section of the rule. To improve clarity, a statement has been added to Section 17(B) regarding the ability of the Board to assume jurisdiction if the criteria set forth in Section 17(C) are met. Additionally, the substance of Section 17(D) has been relocated to Section 17(B), and the statement in Section 17(C) pertaining to referral of an application to the Board jointly by the Commissioner and the applicant has been re-located to Section 17(D).

Section 18. Availability of Draft License Decisions

Comment #24. Section 18(A). Availability of Draft License Decision. Commenter #2 states that the word "intervenor" should be retained in the first sentence and the new last sentence should be deleted arguing that there may be an intervenor in situations other than a hearing. Commenter #4 asks why "intervenor" is deleted from the first sentence.

Response: As stated in response to Comment #2, the Department does not utilize the intervenor process unless a hearing is held. The last sentence in the section states that where a hearing has been held, intervenors will be provided with the draft license decision for review and comment. No change was made to the rule.

Comment #25. Section 18(A). Availability of Draft License Decision. Commenter #4 requests that notice by "mail" be changed to "provide actual notice." Commenter #4 also requests that the rule provide for 15 days to comment on a draft license when a hearing has been held by either the Commissioner or the Board. Commenter #4 proposes the following language:

"In instances where a hearing has been held, the Department shall ~~mail~~ provide actual notice of the draft license decision to the applicant, intervenors and interested persons for review and comment at least 15 days prior to the [day the] Commissioner or Board acts on the application."

Response: With respect to the comment regarding "actual notice," see the response to Comment #16. For consistency with other provisions of the rule and to allow for notice by electronic mail, the word "mail" has been changed to "provide." With respect to the comment regarding the notice period, the rule is consistent with the timeframes set forth in statute for the availability of draft license decisions prior to final action on an application (see 38 M.R.S. §344(4-A)). The statute and rule specify the minimum time

required. Applicants and interested persons may request, and the Commissioner or Board may provide, additional time for review and comment on a draft license decision if they believe additional time is warranted.

Section 19. Decisions

Comment #26. Section 19(B). Commissioner Decisions. Commenter #2 requests that the following language be added to the rule regarding timelines for Commissioner decisions:

> "The processing period for expedited wind energy developments is governed by 38 M.R.S.A. Section 344(2-A)."

Response: Different applications have different processing times established in statute or rule, and it is not necessary or appropriate to enumerate those processing times in this rule. No change was made to the rule.

Comment #27. Section 19(C). Board Decisions. Commenter #2 questions why the language on the effect of an evenly divided vote of the Board was eliminated. Commenter #4 recommends that the language regarding a tie vote be re-instated.

Response: The Department agrees that the language regarding an evenly divided vote of the Board in situations other than an appeal proceeding should be re-instated in this section of the rule. The requested change has been made to the rule.

Additionally, the Office of the Attorney General stated that the language in Section 19(B) requiring Commissioner's decisions to be in writing applies equally to Board decisions. Accordingly, the following language has been added to Section 19(C): "Every license decision made by the Board shall be in writing and shall set forth findings of fact sufficient to appraise the applicant and any interested member of the public of the basis for the decision."

Comment #28. Section 19(D). License Conditions. Commenter #2 proposes eliminating the provision authorizing the Department to attach a condition requiring up to a 30-day delay in any physical alteration of the project area and construction authorized by the permit. The commenter argues that there is no demonstrated need or basis for the provision, and it has the effect of simply prolonging the processing period of an application.

Response: The statute at 38 M.R.S. § 344(8) contains this provision regarding the effective date of a license. No change was made to the rule.

Comment #29. Section 19(D). License Conditions. Commenter #2 proposes adding the following language before the final sentence of the section. "Consistent with any applicable statute or regulation."

Response: It is implicit that the conditions added to a license are consistent with applicable statute and regulation. No change was made to the rule.

Comment #30. Section 19(E). Effective Date of License. Commenter #2 argues that the language "unless otherwise indicated as a condition of the license" should be deleted. The commenter argues that there is no demonstrated need for the language and it may create confusion over the effective date and potential appeal period.

Response: As indicated in the response to Comment #28, the Department's governing statutes provide for an effective date other than the date of signature on the license. No change was made to the rule.

Comment #31. Section 19(F). Report of Decisions. Commenter #4 recommends adding a provision that decisions of the Commissioner and the Board be made available on the Department's website promptly following the date the decision is filed with the Board. This recommendation is also made by this commenter for decisions made under Sections 24(G), 25(E) and 26(G) of the rule.

Response: A requirement to post all licensing decisions on the Department's website would be burdensome in terms of Department staff time and resources. Persons wanting notice of action on a particular application may request interested person status. No change was made to the rule.

Section 21. License Renewals, Amendments and Transfers

Comment #32. Section 21(B). Amendments. Commenter #2 argues that the requirement to provide notice to prior appellants of an amendment to a license that was the subject of an appeal be limited to one year, arguing that amendments may occur many years after the initial licensing and appeal. The commenter proposes to amend the last sentence as follows:

> "If a licensee seeks to amend a license regarding an issue that was the subject of an appeal to the Board within the prior year…"

Response: The Department appreciates the commenter's concern regarding the tracking of such matters over time; however, the provision is limited by its terms to license amendments (not including minor revisions), to issues that were the subject of an appeal (as opposed to any amendment to the license), and to appellants (as opposed to all interested persons). Given that some projects are very complex and are implemented over a period of years, the Department believes that notice to prior appellants, as limited here, is warranted. No change to the rule.

Section 24. Appeal to the Board of Commissioner License Decisions

Comment #33. Section 24 Introductory Paragraph. Commenter #3 states that the Board should have the authority to review the Commissioner's decisions on its own initiative and that this language should be re-inserted in the rule. Commenter #3 recommends the following change to the proposed rule:

> "Final license decisions of the Commissioner may be appealed to the Board by persons who have standing as aggrieved persons or on the Board's own initiative."

Response: Public Law 2011, c. 304 (LD 1) "An Act to Ensure Regulatory Fairness and Reform" eliminated the authority of the Board to review a Commissioner's licensing decision on its own initiative. No change was made to the rule.

Comment #34. Commenter #3 states that the Chair's dismissal of an appeal for untimeliness should be appealable to the entire Board. Commenter #3 argues that the dismissal of an appeal for untimeliness essentially bars the appellant from any relief in any forum. The commenter states that an appellant should have an opportunity to appeal such a "dramatic and final decision."

Response: In most instances an appeal is clearly timely or untimely, and an appeal of such determinations to the full Board may cause unnecessary delays in the licensing process. The Chair's decision to dismiss an appeal as untimely is final agency action and is subject to judicial review. The rule has been amended to clarify that such a dismissal is final agency action.

Comment #35. Section 24(B) Content of Appeal (4). Commenter #3 argues that the requirement of an offer of proof to support an appeal is a significant and unnecessary new requirement that should be deleted. If required at all, it should be required at a later date (not within 30 days).

Response: Contrary to the comment, the proposed rule lessens the burden on the person requesting a public hearing on appeal and recognizes the fact that witnesses may not have been retained prior to the filing of the appeal and request for hearing. Existing Chapter 2, section 24(B)(5) requires that if a public hearing is requested on appeal, the appeal must include "...summaries of all proposed testimony, including the name and qualifications of each witness..." To clarify the intent of the rule, the rule has been amended as follows: "The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and ~~the general qualifications of proposed witnesses~~ whether any expert or technical witnesses would testify."

Comment #36. Section 24(B)(6). Commenter #2 states that the rule should be modified as follows:

> "Appeals must be copied to the Commissioner, ~~and~~ the licensee, and any intervenor."

Response: As stated in response to Comment #2, the Department does not utilize the intervenor process unless a hearing is held. The Department agrees that, in the event the Commissioner has held a hearing on a matter which is the subject of an appeal to the Board, the intervenors in the Commissioner's proceeding should receive a copy of the appeal. The rule has been modified to include the following language: "the licensee, and, if a hearing was held on the application, any intervenor."

Comment #37. Section 24 (C), (D) and (F). Commenter #3 states that intervenors and other interested parties who participated during the Commissioner's licensing proceeding should be permitted to actively participate in all phases of an appeal including: respond to the appeal, comment on the admissibility of proposed supplemental evidence, offer supplemental evidence in response to supplemental evidence offered by the appellant, and participate fully in every aspect of the appeal. The rule should be amended to include this opportunity.

Response: The Department agrees that persons who actively participated during the Commissioner's licensing proceeding through the submission of written comments on the application should be permitted to file a response to an appeal. Such persons may have been in agreement with the Commissioner's licensing decision and, therefore, did not appeal the licensing decision. However, such persons may have filed an appeal if the Commissioner had decided the matter differently. The rule has been changed to re-instate the provision providing for respondents to an appeal in addition to the licensee.

Comment #38. Section 24(C) Response to Appeal (4). Commenter #2 states that, with respect to the timing of the response to an appeal, the word "may" should be changed to "need" in the second line of the new text.

Response: The rule as revised in response to Comment #37 no longer includes the language cited in this comment.

Comment #39. Section 24(D) Record on Appeal, Supplemental Evidence (3). Commenter #2 argues that the licensee should have the right to respond to any new evidence submitted by Department staff and proposes that the following language be added to the rule:

> "The licensee shall have the right to submit evidence responsive to any new evidence submitted by DEP staff pursuant to this section."

Response: Department staff, as staff to the Board in an appeal proceeding, must be able to submit evidence in response to issues raised on appeal and any supplemental evidence admitted to the record on appeal. To allow multiple rounds of proposed supplemental evidence and responses thereto beyond that provided in the rule could lead to significant delays in the processing of an appeal. The appellant and licensee (if other than the appellant) may respond orally to evidence submitted by Department staff at the Board meeting when the appeal is considered. No change was made to the rule.

Comment # 40. Section 24(F) Procedure. Commenter #4 recommends inserting the following language to state that the record on appeal includes oral argument at a Board meeting:

> "Appeals decided without a hearing will be based on the administrative record on appeal which record shall also include ~~and~~ oral argument at a regular meeting of the Board as follows…"

Response: As set forth in Section 24(D) of the rule, the record for appeals is the administrative record prepared by the Department in its review of the application unless the Board admits supplemental evidence or decides to hold a hearing. Oral argument at a Board meeting is not part of the evidentiary record. No change was made to the rule.

Section 25. Revocation or Suspension of a License

Comment #41. Section 25(B). Filing of Petition with the Commissioner. Commenter #2 requests that the rule be modified as follows:

> "The licensee's response to the petition must be filed within 30 days of the filing of the petition with the Commissioner unless the Commissioner, upon a request by the licensee and for good cause shown, extends that deadline."

Response: The Department recognizes that a petition to revoke or suspend a license may be complex and the licensee may require more than 30 days to respond. The requested change has been made to the rule.

Comment #42. Section 25(F). Decision Discretionary. Commenter #3 states that the rule should not limit the ability of a petitioner to appeal the Commissioner's decision to court; the Commissioner's decision on a petition to revoke or suspend a license should be subject to judicial review.

Response: The Law Court has ruled that the decision to grant or deny a petition for revocation or suspension of a license lies in the agency's sole discretion. (2008 ME 156 Ed Friedman et al. v. Maine Board of Environmental Protection). No change was made to the rule.

Section 26. Modification of License or Order Prescribing Corrective Action

Comment #43 Sections 26(A), (E) and (G). With respect to the ability of the Board to order corrective action, Commenter #4 recommends inserting language that would specify that the order be issued to the licensee. Commenter #4 makes a similar comment regarding Section 27 of the rule.

Response: Although orders prescribing corrective action would generally be issued to the licensee, the Department does not want to foreclose the possibility that under some circumstances it may be appropriate to issue the order to a person other than the licensee. No change was made to the rule.

Comment #44. Section 26(B). Filing of Petition with the Commissioner. Commenter #2 requests that the rule be modified as follows:

> "The licensee's response to the petition must be filed within 30 days of the filing of the petition with the Commissioner unless the Commissioner, upon a request by the licensee and for good cause shown, extends that deadline."

Response: The Department recognizes that a petition to modify a license or order corrective action may be complex and the licensee may require more than 30 days to respond. The requested change has been made to the rule.

Comment #45. Section 26(H). Decision Discretionary. Commenter #3 states that the rule should not limit the ability of a petitioner to appeal to a court; the Board's decision on a petition to modify a license or issue an order prescribing corrective action should be subject to judicial review.

Response: The Law Court has ruled that the decision to grant or deny a petition for modification or corrective action lies in the agency's sole discretion. (2008 ME 156 Ed Friedman et al. v. Maine Board of Environmental Protection). No change was made to the rule.

General Comments

Commenters also noted some minor typographical errors which have been corrected.

Additional Changes

M.R.S.A. (Maine Revised Statutes Annotated) has been changed to M.R.S. (Maine Revised Statutes) throughout as that is the form now preferred by the courts.